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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LACY STREET HOSPITALITY SERVICE, INC., Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B170716 (Los Angeles County Super. Ct. No. BS 084476)

APPEAL from the judgment of the Superior Court of Los Angeles County. David P. Yaffe, Judge. Reversed and remanded.

Roger Jon Diamond for Plaintiff and Appellant.

Rockard J. Delgadillo, City Attorney, Jeri L. Burge, Assistant City Attorney, Michael L. Klekner and Steven N. Blau, Deputy City Attorneys for Defendant and Respondent.

Appellant Lacy Street Hospitality Services, Inc. ("LSHS") appeals from the trial court's judgment denying it an administrative writ of mandate. We reverse and remand for a hearing before the Los Angeles City Council that satisfies appellant's due process right to be heard.

FACTS AND PROCEDURAL HISTORY

LSHS leased commercial property in Los Angeles to operate an adult cabaret known as The Blue Zebra, which showcased nude female dancers. When LSHS took over the property, it assumed 20 land use restrictions imposed by the City of Los Angeles on the property's previous tenant, who had unsuccessfully tried to operate an adult cabaret on the site. The city had imposed the conditions in order to mitigate the previous cabaret's harmful secondary effects on the surrounding neighborhood. (See Los Angeles Municipal Code, § 12.27.1 [permits administrative nuisance abatement proceedings].)[1]

After taking over the property, LSHS exercised its right to seek a modification of the city's 20 conditions. (L.A.M.C. 12.27.1 (D) [allows modification of existing zoning conditions].) One condition limited the cabaret's hours from 6 p.m. to 2 a.m. seven days a week. The second required LSHS to use independent contractors as security guards. Claiming it needed longer operating hours in order to make a profit, LSHS sought permission to open at 11 a.m. every day and to extend its weekend closing hours to 4 a.m. Friday through Sunday. LSHS also sought permission to hire its own licensed guards to provide security, instead of using an independent contractor.

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[1] Although nude dancing is protected expressive activity under the First Amendment, government may regulate where such activity occurs provided it does not ban it outright. (*Barnes v. Glen Theater, Inc.* (1991) 501 U.S. 560, 566.) In addition, government may regulate harmful secondary effects associated with nude dancing so long as the regulations do not target protected First Amendment expression. (*E.W.A.P., Inc. v. City of Los Angeles* (1997) 56 Cal.App.4th 310, 317, 325-327.)

LSHS submitted its requested modifications to the city's Zoning Administrator ("ZA"). After holding a public hearing and visiting the property, the ZA granted the modifications. In support of his decision, the ZA filed a detailed 22-page report, describing the evidence for and against the modifications and the reasons for his ruling.

Neighborhood and community members who opposed the modifications appealed the ZA's decision to the Los Angeles City Council, which referred the appeal to its Planning and Land Use Management ("PLUM") Committee. The PLUM committee held a hearing on the proposed modifications. After hearing of the purportedly deleterious effects of expanding LSHS's operating hours and loosening security guard requirements, the PLUM committee recommended that the city council reverse the ZA and reinstate the original conditions. The city council scheduled a public hearing on the PLUM committee's recommendations and overturned the ZA.

LSHS filed a petition for a writ of administrative mandate. The trial court reviewed the city council's reversal of the ZA. The court found substantial evidence supported the council's action, and thus the council's decision was not an abuse of discretion. The court therefore denied the petition. This appeal followed.

DISCUSSION

Instead of reviewing the trial court's judgment, we review the city council's decision reversing the ZA. Regardless of how the trial court assessed the matter, we will reverse the city council if we find it abused its discretion. (*Stolman v. City of Los Angeles* (2003) 114 Cal.App.4th 916, 922; Code Civ. Proc., § 1094.5, subd. (b).) The city council was obligated to be fair and impartial. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1024-1026; *Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90-91.) Its duty to discharge its powers responsibly is

especially weighty when, as here, the city asserts the ZA's decision did not constrain the council.[2]

A picture is worth a thousand words, and here the picture was a videotape. LSHS recorded the city council hearing, slowly moving the camera's gaze back and forth from one end of the council table to the other, at times lingering on particular council members, capturing their behavior at that moment. The tape shows that when the council president summoned LSHS to the speaker's lectern to present its case, eight council members--three of whom were absent--were not in their seats. Only two council members were visibly paying attention. Four others might have been paying attention, although they engaged themselves with other activities, including talking with aides, eating, and reviewing paperwork.

One minute into LSHS's presentation, a council member began talking on his cell phone and two council members, one of whom had been paying attention when the hearing opened, started talking to each other. A minute later, two other council members struck up their own private conversation. Three minutes into his presentation, LSHS's counsel complained "it doesn't appear that too many people are paying attention," an observation the videotape verifies, as only a few council members were sitting in their seats not talking to others.

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[2] The city argues its municipal code allows the city council the broadest possible de novo review of the ZA's decision. We note, however, that the Los Angeles Municipal Code states, "When considering an appeal from the decision of an initial decision maker, the appellate body shall make its decision, based on the record, as to whether the initial decision maker *erred or abused his or her discretion*." (L.A.M.C. 12.24(I)(3).) When the municipal code provides a standard, the city must apply it. (*BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1221 & fn. 10; *Civil Service Assn. v. Redevelopment Agency* (1985) 166 Cal.App.3d 1222, 1225-1227.) The city's argument makes the phrases "error" or "abuse of discretion" a nullity, a reading we must avoid. Only when a municipal code is silent about the standard of review may we presume de novo review. (*Lagrutta v. City Council* (1970) 9 Cal.App.3d 890, 894-895.) We need not decide this issue, however, because whether de novo or abuse of discretion, the city council did not conduct itself as a fair and impartial body.

Despite LSHS's public reproach of council members, their private conversations and pursuit of other activities continued. For example, the council member with the cell phone started another conversation on it and four council members talked among themselves or with others. One council member was especially peripatetic, walking from one side of the council chamber to the other to talk to different colleagues. Only five council members and the council president sat at their desks spending most of their time not talking to anyone--but even some of them turned their attention to other things from time to time.

After 10 minutes, LSHS's presentation ended and those opposed to the zoning modifications began. Although the speakers changed, the council's behavior did not.[3] Some members paid attention, but even some of them divided their attention among things such as reviewing paperwork and getting up from their seats to talk to others. At one point, the camera zoomed out for a wide angle shot of the entire council table. At that moment, only five members were at their seats, and only one member appeared to be focusing on what the speakers were saying.

We do not presume to tell the city council how it must conduct itself as a legislative body. Here, however, the city council was sitting in a quasi-judicial role, adjudicating the administrative appeal of constituents. A fundamental principle of due process is "he who decides must hear." (*Vollstedt v. City of Stockton* (1990) 220 Cal.App.3d 265, 276.) The inattentiveness of council members during the hearing prevented the council from satisfying that principle. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1024 ["due process requires fair adjudicators in administrative tribunals"]; *Henderling v. Carleson* (1974) 36 Cal.App.3d 561, 566 [takes as a given that administrative decision maker listens at hearing] disapproved on another point by *Frink*

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[3] The city's argument that the hearing was "fair" because council members treated LSHS and its opponents alike is unavailing because LSHS and its opponents had the right to be equally heard, not equally ignored.

v. Prod (1982) 31 Cal.3d 166, 180; *Chalfin v. Chalfin* (1953) 121 Cal.App.2d 229, 233 [fact finder must listen to the evidence before making a decision].) Sitting as "judges" in the appeal, the council was obligated to pay attention as is the obligation of sitting members of the judiciary. (Accord, *In re Grossman* (1972) 24 Cal.App.3d 624, 629 ["Members of the bar have the right to expect and demand courteous treatment by judges . . ."]; Model Code of Judicial Conduct Canon 3 (B)(4) (American Bar Association 2000) ["A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity . . ."].) The council's distraction with a multitude of other things during the hearing is especially troubling because it was reversing its own zoning administrator who took great care to reach his decision. It is not our province to insist that the council members consider every word of every witness. Good judgment and common sense are entitled to prevail. (*Vollstedt v. City of Stockton, supra,* 220 Cal.App.3d at p. 276.) Here, however, the tape shows the council cannot be said to have made a reasoned decision based upon hearing all the evidence and argument, which is the essence of sound decision making and to which LSHS was entitled as a matter of due process. Accordingly, we reverse and remand.

DISPOSITION

We reverse and remand to the city council for a hearing that satisfies appellant Lacy Street Hospitality Service's due process right to be heard. The parties are to bear their own costs.

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RUBIN, J.

We concur:

COOPER, P.J. BOLAND, J.